IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

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MICHAEL RODAK, JR., CLERK

No. 77-1248

THE ILLINOIS STATE BOARD OF ELECTIONS,
Defendant-Appellant,

v.

SOCIALIST WORKERS PARTY, MICHAEL TABER, and JOHN DOE,
Plaintiffs-Appellees.

THE ILLINOIS STATE BOARD OF ELECTIONS,
Intervening Defendant-Appellant,

v.

GERALD ROSE, MELVIN JOHNSON, RICHARD LEEBOVE, UNITED STATES LABOR PARTY, JOHN BROWN and MITCHELL HIRSCH,
Plaintiffs-Appellees,

and

JOHN HANLY, MARIE H. SUTHERS, and HOWARD C. MEDLEY, SR.,
Defendant-Appellees.

On Appeal From The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF OF APPELLANT THE ILLINOIS STATE BOARD OF ELECTIONS

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SUMMARY OF ARGUMENT

So long as the principle of *stare decisis* is to remain the means by which the judiciary fosters the maintenance of public confidence in impersonal and reasoned judgments, sound judicial considerations mandate that this Court reaffirm its decision in *Jackson* v. *Ogilvie,* 325 F. Supp. 864 (N. D. Ill. 1971), *summarily aff'd,* 403 U.S. 925 (1971).

In appellees' brief, Gerald Rose, U.S. Labor Party, *et al.,* (All future references to "appellees" refer to said appellees, unless otherwise noted), it is urged that an equal protection challenge to Secs. 10-2, 10-3 of 46 Ill. Rev. Stats. (Election Code) was neither presented to nor decided by either the district court or this Court in *Jackson.* In response to this contention, appellant makes three arguments: (1) that the 5% minimum signature requirement for nominating petitions for independent candidates to achieve access to the general election ballot withstood constitutional attack in *Jackson;* thus, this Court's summary affirmance was binding precedent on the courts below; (2) that the equal protection question at issue in this case, namely, dissimilar treatment afforded independent candidates and new political parties seeking office in the City of Chicago as compared to treatment afforded independent and new political party candidates seeking statewide office (25,000 minimum signature requirement) was presented to and decided by this Court in *Jackson;* (3) that even absent the *Jackson* decision, Secs. 10-2, 10-3 of Chap. 46 Ill. Rev. Stats. do not violate the Equal Protection Clause of the United States Constitution.

REPLY

I.

THE COURT'S SUMMARY AFFIRMANCE IN *JACKSON* v. *OGILVIE,* WAS BINDING PRECEDENT ON THE COURTS BELOW.

In *Jackson* v. *Ogilvie,* this Honorable Court ruled that the statutory provisions at issue were not discriminatory in light of an equal protection challenge identical to the equal protection challenge herein raised and argued unsuccessfully by the *Jackson* plaintiffs. The Illinois 5% signature requirement for nomination papers was specifically upheld as applied to independent candidates for Mayor of the City of Chicago — the same signature requirement for the same office sought by appellees in this action. Still, appellees argue that no "compelling state interest" has been proven in this action to justify the Illinois law governing ballot access; yet, the "compelling state interest" has been previously examined and settled by *Jackson.*

In attempting to avoid *Jackson,* appellees assert that this Court should acquiesce in the principle that this Court's previous holdings are susceptible to contrary holdings by the lower federal courts and cite *Hicks* v. *Miranda,* 422 U.S. 332, 95 S. Ct. 2281 (1975), in support thereof. Appellees further suggest that *Mandel* v. *Bradley,* 432 U.S. 173, 97 S. Ct. 2238 (1977), supports their restrictive and foundationless interpretation of the juristic principle of "summary affirmance." However, *Mandel* is in accord with *Hicks,* that courts are bound to follow the law as established by summary affirmances:

> As of January 31, 1978, only five reported cases had cited *Mandel* v. *Bradley: Morial* v. *Judiciary Comm'n,*

565 F. 2d (5th Cir. 1977); *In re Letourneau,* 559 F. 2d 892 (2d Cir. 1977); *Halderman* v. *Pennhurst State School & Hospital,* No. 74-1345 (E.D. Pa. Dec. 23, 1977); *Drumright* v. *Padzieski,* 436 F. Supp. 310 (E.D. Mich., 1977); *Moritt* v. *Governor of New York,* 42 N.Y. 2d 347, 366 N.E. 2d 1285, 397 N.Y.S. 2d 929 (1977). None of these cases indicates that lowers courts regard *Mandel* as an abandonment of *Hicks.* (Virginia Law Review, Vol. 64, p. 119, 1978).

Summary affirmances and dismissals for want of a substantial federal question without doubt reject the specific challenges presented in the statement of jurisdiction and do leave undisturbed the judgment appealed from. They do prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions. After *Salera,* for example, other courts were not free to conclude that the Pennsylvania provision invalidated was nevertheless constitutional. Summary actions should not be understood as breaking new ground, but as applying principles established by prior decisions to the particular facts involved. *Mandel* v. *Bradley,* 97 S. Ct. at 2240.

Contrary to appellees' assertion, the *Hicks* case indeed supports appellant's argument, when as in this case, this Court is presented with an identical challenge against the same statute. In *Jackson,* as well as the case at bar, the equal protection argument relied upon by appellees was in fact raised in the *Jackson* Jurisdictional Statement. Accordingly, the summary affirmance in *Jackson* must be considered for its precedential value not only because the same statute is involved, (and in fact the same argument), but the facts are not even notably distinguishable.

In fact, appellees have inexcusably misstated the argument of appellant. On page 28 of the appellees' brief, they claim "The State Board does not contend that the three-

judge court in *Jackson* decided the equal protection question presented in this case." Nothing could be further from the truth. (See appellants' brief at p. 15.)

Appellees also claim, on pages 20-21 of their brief, that the equal protection argument was never raised in *Jackson;* yet, attached to their own brief is the Jurisdictional Statement filed in *Jackson* which reads at page 14A:

> These defendants, state officials, by their answer further admit that in this regard, Sec. 10-3 of the statutes challenged herein, deny to appellants Sharon P. Wilkinson and Melvin M. Maclin federally protected rights. Defendants Richard Ogilvie and William J. Scott further filed in the trial court below their Memorandum of Law in support of plaintiff's request for injunctive and declaratory relief, which *Memorandum of Law* has been designated as a part of the Record docketed in this Court for purposes of this appeal. (Emphasis supplied)

This *Memorandum of Law* referred to in this quotation and as contained in appellees' Appendix D, at page 23a states in pertinent part as follows:

> 2. Section 10-3 discriminates against independent candidates in several ways. . . . It must also be remembered that it is even more difficult for an independent candidate to obtain signatures than it would be for an independent party. Yet a whole new State political party needs only 25,000 signatures throughout the entire State for state offices, (Section 10-2), while a single independent candidate for only the office of Mayor of Chicago, needs almost 60,000 signatures. This also is an invidious discrimination against one seeking the office of Mayor of Chicago.

Hicks and *Mandel* support appellant's argument that *Jackson* v. *Ogilvie* is not notably distinguishable from the case at bar in terms of facts, issues and legal arguments.

The approach suggested by appellees would throw the doctrines of *stare decisis* and *summary affirmance* in chaos; therefore, appellees' contentions should be summarily rejected.

II.

SECTIONS 10-2 AND 10-3 OF THE ILLINOIS ELECTION CODE DO NOT DEPRIVE THE APPELLEES OF THEIR EQUAL PROTECTION RIGHTS.

In Illinois, any independent candidate or a candidate of a new political party who is running for an office, less than statewide, must gather signatures equaling at least 5% of the number of voters who voted at the last general election. Parenthetically, it is significant to note that this signature requirement is based upon the number of voters who actually *voted* at the last election and not, as it is in many states, upon the higher figure of voters who are *registered*. This signature requirement, based upon number of voters, is necessary so that some preliminary showing of support in the community is demonstrated before the ballot access is allowed. The actual number is flexible and varies, depending upon the office and the political subdivision.

Appellees, however, have conveniently utilized another section of Illinois law that deals with the signature requirements for candidates of statewide offices and juxtapositioned it so as to try to create an unlawful classification. The two sections of the statute are not related to each other and a discussion of the signature requirements for statewide candidates is not constitutionally significant regarding the validity of the 5% requirement for independent or new political party mayoral candidates seeking less than statewide office.

Appellees strenuously argue that the challenged classification fails to satisfy the "compelling state interest" test, citing a number of decisions of this Court covering the full gamut of equal protection controversies. However, the "compelling state interest" doctrine does not automatically invalidate each and every classification in the law. *Storer* v. *Brown*, 415 U.S. 724; 94 S. Ct. 1274. As noted in *Storer*:

> It is very unlikely that all or even a large portion of the state election laws would fail to pass muster under our cases; and the rule fashioned by the Court to pass on constitutional challenges to specific provisions of election laws provides no litmus-paper test for separating those restrictions that are valid from those that are invidious under the Equal Protection Clause. The rule is not self-executing and is no substitute for the hard judgments that must be made. Decision in this context, as in others, is very much a matter of degree, Dunn v. Blumstein, *supra*, 405 U.S., at 348, 92 S. Ct., at 1006, very much a matter of consider[ing] the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification. Williams v. Rhodes, *supra*, 393 U.S., at 30, 89 S. Ct., at 10; Dunn v. Blumstein, *supra*, 405 U.S., at 335, 92 S. Ct., at 999. What the result of this process will be in any specific case may be very difficult to predict with great assurance. 415 U.S. at 731, 94 S. Ct. at 1279.

Appellant submits that the distinction between less-than statewide candidates and statewide candidates is not tantamount to an equal protection violation; that the failure of the State to apply a 5% minimum signature requirement to statewide candidates does not deprive appellees of their constitutional rights.

III.

THE ISSUE AS TO THE AUTHORITY OF A LOCAL ELECTION AGENCY TO REDUCE THE SIGNATURE REQUIREMENTS IS NOT MOOT.

Appellees argue that the issue of the authority of the Appellee, Chicago Board, to lower the statutory signature requirements and to extend the statutory petition filing deadline is moot since the order reflected an agreement entered to apply solely to the June 7, 1977 special mayoral election in Chicago. Obviously, the crucial issue is whether the Chicago Board or any election authority, for that matter, may lower signature requirements and extend filing dates for *any* election given their statutory authority under the Election Code. See, Ill. Rev. Stat., Ch. 46, Sec. 6-21 *et seq.*

The failure of the lower courts to decide this issue will undoubtedly lead to repetition of such action in future cases by the Chicago Board as well as by other municipalities and counties receiving nominating petitions and conducting elections. See, *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission,* 19 U.S. 498 (1911); *Moore* v. *Ogilvie,* 394 U.S. 814, 89 S. Ct. 1493 (1969). Certainly, this issue is "capable of repetition, yet evading review."

In support of their argument, appellees, the Chicago Board, erroneously state that the State Board "agreed to a lowering" of the signature requirement for independent candidates from 63,373 to 35,947. (Brief of Appellee—Chicago Board of Election Commissioners at page 9.) In fact, the original 63,373 signature figure was an incorrect calculation by the Chicago Board. The Appellant corrected that figure to 35,947, which reflected 5% of the

voters who voted at the last election. As such, 35,947 was the correct minimum signature *requirement* for new political parties and independent candidate nominating petitions for the office sought.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the decision of the United States Court of Appeals for the Seventh Circuit be reversed.

Respectfully submitted,

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